APPEAL NO. 93108

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On January 8, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the CCH was "[w]hether Claimant, VG, injured his back within the course and scope of his employment with [employer] on or about (date of injury)." The hearing officer determined that the appellant, claimant herein, injured his left foot and back in the course and scope of his employment with the employer. The hearing officer ordered claimant he paid temporary income benefits (TIBS) if claimant has established or can establish that he has had disability for eight or more days. Claimant complains of the hearing officer's order stating "a finding of injury in the course and scope of employment where disability is not an issue requires an inferential finding of disability which automatically results in the commencement of [TIBS]." Respondent, carrier herein, files a timely response and raises two "cross points of error."

DECISION

The decision of the hearing officer is affirmed.

We find claimant's appeal and carrier's response were timely filed. We find that carrier's cross points of error, as being an appeal from the hearing officer's decision, were not timely filed for the reasons set forth below.

The decision of the hearing officer was distributed, by mail, on January 20, 1993. Neither claimant or carrier assert in their respective pleadings when the decision was received, therefore the provisions of Commission Rule 102.5(h) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h)) are invoked. Rule 102.5(h) provides:

(h)For purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the commission shall deem the received date to be five days after the date mailed.

Consequently, since the decision was mailed on January 20, 1993, the deemed date of receipt is January 25,1993. Article 8308-6.41(a) requires that an appeal shall be filed with the Appeals Panel "not later than the 15th day after the date on which the decision of the hearing officer is received. . . . " The deemed date of receipt was January 25, 1993 and 15 days from that date would be Tuesday, February 9, 1993, which would be the statutory date by which an appeal must be filed. Claimant's appeal is postmarked February 5th, received February 9th and hence is timely filed. Carrier's response, containing the cross points of error, was postmarked February 15, 1993 and received February 18th. The Appeals Panel has previously held that points of appeal raised for the first time in a response will not be considered if that response is not filed within 15 days after the decision of the hearing officer is received. Texas Workers' Compensation Commission Appeal No. 92109,

decided May 4, 1992. Carrier's response, as being timely filed, will be considered; however, the cross points of error, as not being filed within 15 days after receipt of the hearing officer's decision were not timely filed and will not be considered.

Claimant testified through an interpreter that he was working as a construction worker for the employer on (date of injury), picking up street barricades. The testimony was a passing car hit the barricade in such as way that it struck claimant's left foot. The litigated question was whether this accident also injured claimant's back. Claimant went to the doctor on February 9th. Claimant testified that he returned to work on February 11th. Claimant sought further medical care from Redbird Emergency Center on March 18th; he was given a release for work but did not return to work for the employer. Carrier contests the back injury was sustained in the accident of (date of injury).

Claimant's appeal concedes that the sole issue before the hearing officer at the CCH was "whether or not [claimant] injured himself in the course and scope of his employment." Claimant argues "[l]ogically, a finding of injury in the course and scope of employment has to establish a presumption of disability until it is contested by the Carrier." We do not agree. However, we believe the orderly and final resolution of a case would be well served if the disability determination officer, the benefit review officer and perhaps the hearing officer inquired whether there is any dispute as to other issues that are or may be related to the principal issue, *e.g.*, where there is an issue concerning injury in course and scope, is there any dispute as to benefits if injury in course and scope is found.

The hearing officer, through Article 8308-6.31 and Rule 142.7, is directed to consider only those issues contained in the statement of disputes. In this case, claimant agreed the sole issue was whether claimant was injured in the course and scope of his employment. Issues not raised at the BRC may not be considered except by consent of the parties or unless the Commission determines that good existed for not raising the issue earlier. Article 8308-6.31(a). Neither exception is applicable here. Neither party questioned the framing of the disputed issue nor did claimant seek the addition of any other disputed issue pursuant to Rule 142.7. Under these circumstances, claimant has waived any complaint concerning the framing of the disputed issue by the hearing officer. With no issue of disability before him, the hearing officer was correct in not making findings or conclusions on that matter. *See* Texas Workers' Compensation Commission Appeal No. 91007, decided August 28, 1991, citing Southwest Airlines v. Bullock, 784 S.W.2d 568 (Tex. App.-Austin 1990, no writ) for the proposition that Texas Workers' Compensation Commission rules have the force and effect of law.

Although not necessary for the resolution of this case, we would point out for claimant's benefit that disability has an economic definition under the 1989 Act. Article 8308-1.03(16) defines disability as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." As may be evident

under this definition, an employee may have sustained a compensable injury and still not have disability as defined above. We note that, contrary to claimant's statement that "disability was clearly established by the . . . medical evidence," that the medical records do not reflect that claimant was unable to obtain or retain employment at claimant's preinjury wage. In fact, that evidence shows claimant returned to work until terminated on March 18th. We do not agree that "a finding of injury in the course and scope of employment where disability is not an issue requires an inferential finding of disability." Article 8308-4.22 discusses when weekly income benefits begin in relation to disability. Clearly, under this section, TIBS are not paid for an injury that does not result in disability of at least one week, and that disability may not follow at once after the injury occurs. We have also previously held that an injured employee can go back and forth between periods of disability, so long as all the statutory prerequisites are met. *See* Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, and Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992. Clearly then, there is no automatic inferential finding of disability, as defined by the 1989 Act, merely on upon a finding of injury in the course and scope of employment.

The hearing officer properly determined the issue placed before him and his order regarding the payment of TIBS was correct in law and fact.

The hearing officer's decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge